IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

STATE OF ALABAMA

Plaintiff,

v.

Civil Action No.: 2:06cv00920-MHT

ABBOTT LABORATORIES, INC., *et al.*,

Defendants.

KING PHARMACEUTICALS, INC. AND MONARCH PHARMACEUTICALS, INC.'S MOTION TO VACATE

Defendants/Counterclaim-Plaintiffs, King Pharmaceuticals, Inc. and Monarch Pharmaceuticals, Inc. (collectively "King"), move this honorable Court pursuant to FED. R. CIV. P. 59(e) to vacate the state court order of July 12, 2006, dismissing King's Counterclaim.[1] In support of this motion, King states as follows:

[1] A motion to vacate pursuant to FED. R. CIV. P. 59(e) is the appropriate procedural vehicle for this Court to review the state court order dismissing King's counterclaim because of the recognized "legal fiction that the state court judgment is a federal district court judgment." *Jackson v. American Savings Mortgage Corp.*, 924 F.2d 195, 198 (11th Cir. 1991) ("After removal, state court proceedings are treated as those of the district court.") (citing *Savell v. Southern Ry.*, 93 F.2d 377, 379 (5th Cir. 1937). In fact, King is required to file such a motion in order to preserve its right to an appeal. *Id.* at 199. ("When a case removed to a federal court has in it at the time of removal an order or judgment of the state trial judge which, had it been entered by a [federal] district judge, would be appealable to [the federal appellate court], it shall be incumbent on the party seeking an appeal first to move that the district judge modify or vacate the order or judgment.")

BACKGROUND

This lawsuit was filed by Plaintiff/Counterclaim-Defendant, State of Alabama ("State"), against King and numerous other pharmaceutical suppliers on January 25, 2005, regarding the State's administration of the Alabama Medicaid program. Specifically, the State alleges that King and others intentionally provided inflated pricing information to national drug industry reporting services. The State further alleges that it relied upon the prices reported by those services as a basis for calculating reimbursements to the medical or pharmacy providers who provide the drugs to patients, ultimately causing the State to overpay for the drugs.

King filed a counterclaim against the State, alleging that, due to calculation errors, King mistakenly overpaid rebates to the State pursuant to the federal Medicaid Rebate Program, 42 U.S.C. § 1396r-8. King's counterclaim further alleges that such erroneous overpayments in some cases exceed the amount of any reimbursements paid by the State with respect to the same King product. King alleges that the overpayments do not belong to the State but, instead, rightfully belong to King.

King's counterclaim contains four separate counts: Count One – Action for Refund of Overpayment; Count Two – Unjust Enrichment; Count Three – Money Had and Received; and Count Four – Writ of Habeas Corpus. Among other things, King's counterclaim requests a declaration that King is entitled to a refund from

the State for erroneous overpayments and a writ of habeas corpus requiring that the appropriate officials of the State deliver to King the funds representing King's erroneous overpayments.

The State responded to King's counterclaim by filing a Motion to Dismiss based solely upon the doctrine of sovereign immunity. A true and correct copy of the State's Motion to Dismiss is attached hereto as **Exhibit A**. King filed a brief in opposition arguing that King's counterclaim falls into an exception to the doctrine of sovereign immunity for claims for overpayments erroneously paid to the State ("Opposition Brief"). A true and correct copy of King's Opposition Brief is attached hereto as **Exhibit B**.

On May 19, 2006, the state court heard oral argument on the State's Motion to Dismiss King's counterclaim. A copy of the hearing transcript is attached hereto as **Exhibit C**. The State argued that King's counterclaim was barred by the doctrine of sovereign immunity, and King responded that its counterclaim falls under an exception to the doctrine of sovereign immunity, permitting claims against the State for moneys erroneously paid.

The State introduced a new argument for the first time at the hearing, claiming that King failed to follow compulsory administrative processes before filing its counterclaim. King objected to the state court judge's consideration of the new argument, since it had neither been briefed nor made the basis of the

State's Motion to Dismiss. As part of its argument regarding administrative processes, the State produced a sample rebate agreement. The State did not elicit testimony or otherwise attempt to authenticate the sample agreement. The sample agreement was not designated as an exhibit, was not given an exhibit number, and was not attached to the hearing transcript. In short, the sample rebate agreement was never introduced in evidence and never became a part of the record in this case. Moreover, the sample agreement was not signed by anyone and did not contain King's or the State's name anywhere in it. The State nevertheless suggested that the sample agreement could be used to show specific contract terms between the State and King. King objected to the State's use of the sample agreement.

After the hearing, with the permission of the state court, King filed a supplemental brief in opposition to the State's Motion to Dismiss King's counterclaim ("Supplemental Opposition Brief"). A true and correct copy of King's Supplemental Opposition Brief is attached hereto as **Exhibit D**.

On July 10, 2006, the state court signed an order granting the State's Motion to Dismiss King's Counterclaim, holding that King's counterclaim was barred by sovereign immunity and, alternatively, by the doctrine of exhaustion of administrative remedies. The order referred to a "contract between the State and

King," although no contract between the State and King was in evidence and has never been made a part of any record related to this case.

The dismissal order was entered by the clerk on July 12, 2006. Prior to the removal of this case to this Court, King's appeal was pending before the Alabama Supreme Court and was being considered for referral to mediation.

STANDARD OF REVIEW

"[A] federal district court may dissolve or modify injunctions, orders, and all other proceedings which have taken place in state court prior to removal." *Maseda v. Honda Motor Co.*, 861 F.2d 1248, 1252 (11th Cir. 1988).

It is never proper to dismiss a complaint for failure to state a claim under Rule 12(b)(6) if it contains even a generalized statement of facts that will support a claim for relief. *Ancata v. Prison Health Svs., Inc*., 769 F.2d 700, 703 (11th Cir. 1985) (threshold for sufficiency of complaint "exceedingly low"); *Milburn v. United States*, 734 F.2d 762, 765 (11th Cir. 1984) (complaint should not be dismissed "unless it appears beyond a doubt that plaintiff could prove no set of facts that would entitle him to relief").

ARGUMENT

King's counterclaim is not barred by sovereign immunity, because it does not seek damages or other remuneration to be paid from the State's treasury, but instead seeks only the return of funds erroneously paid to the State that rightfully

belong to King. Furthermore, King's counterclaim is not barred by the doctrine of exhaustion of administrative remedies, because there is no allegation or evidence in the record that administrative remedies are available to King.

I. King's counterclaim states a viable claim for relief, because it seeks repayment of erroneous payments to the State, a recognized exception to the State's right of sovereign immunity.

While it is true that Sec. 14 of the Alabama Constitution of 1901 provides that "the State of Alabama shall never be made a defendant in any court of law or equity," and that Alabama's courts have observed that "the wall of immunity erected by Sec. 14 is *nearly* impregnable . . . ." *E.g., Alabama A&M Univ. v. Jones*, 895 So.2d 867, 872-73 (Ala. 2004)(emphasis added), there are indeed limited exceptions to the sovereign immunity of the State.

In *Aland v. Graham*, 250 So.2d 677 (Ala. 1971), the Court listed four general categories of cases which are not barred by Sec. 14:

(a) Actions brought to compel State officials to perform their legal duties;

(b) Actions brought to enjoin State officials from enforcing an unconstitutional law;

(c) Actions to compel State officials to perform ministerial acts; and

(d) Actions brought under the Declaratory Judgments Act, seeking construction of a statute and how it should be applied to a given situation.

The *Aland* court expressly recognized that this list might not be exhaustive. Other opinions indicate that an action for repayment of moneys erroneously paid to the State is not barred by Sec. 14.[2] For example, in *Alabama Dept. of Environmental Mgmt. v. Town of Lowndesboro*, 2005 WL 791239 (Ala. Civ. App. 2005), Presiding Judge Crawley, concurring specially, expressly recognized that "[i]n appropriate circumstances, Sec. 14 does not bar a proceeding against the State for the recovery of moneys that do not belong to the State or that have not been properly acquired by the State." The Alabama Supreme Court recently affirmed *Alabama Dept. of Environmental Mgmt. v. Town of Lowndesboro* in *Ex parte Town of Lowndesboro*, 2006 WL 1304902, *19 (Ala. 2006). While the Alabama Supreme Court did not specifically address the exception to sovereign immunity for actions for recovery of moneys that do not belong to the State, the court in *Ex parte Town of Lowndesboro* explained that § 14 sovereign immunity protects the State against situations "'when a favorable result for the plaintiff would directly affect a *contract* or property *right* of the State, or would result in the plaintiff's recovery of money from the [S]tate.'" Id at *2 (quoting *Ala. Agric. & Mech. Univ. v. Jones*, 895 So. 2d 867, 873 (Ala. 2002) (emphasis in original). The court further

[2] In the *ADEM* case, the court declined to allow an award of attorneys' fees. The concurrence distinguished that situation from the cited cases, noting that "the award of attorney fees in this case, [] would be paid from the State treasury and not from funds that were improperly collected . . . ." and would "result in the type of direct affect on the financial status of the state treasury that is prohibited by Sec. 14."

summarized actions subject to sovereign immunity as actions seeking "damages or funds from the State treasury." Id.

As the *Ala. Dept. of Environ. Mgmt. v. Town of Lowndesboro* court noted, a number of cases have permitted suits that seek repayment of moneys erroneously paid to the State that do not rightfully belong to the State treasury. 2006 WL 1304902 at *19 (Ala. 2006). In *Dept. of Industrial Relations v. West Boylston Mfg. Co.*, 42 So. 2d 787 (Ala. 1949), the Alabama Supreme Court permitted recovery of a refund of contributions to the unemployment-compensation fund. *See also, Glass v. Prudential Ins. Co. of America*, 22 So. 2d 13 (1945) (statute requiring that taxes paid under protest be held in trust pending determination of their legality did not violate Sec. 14); *Ex parte McCurley*, 412 So.2d 1236 (Ala. 1982) (sovereign immunity did not bar a judgment requiring the State to return fines and costs that it had imposed on a criminal defendant after her conviction was reversed on appeal); *Horn v. Dunn*, 79 So. 2d 11 (1955) ("No judgment against the State was sought or granted. True, the decree may ultimately touch the State treasury. Yet, the State treasury suffers no more than it would, had the Commissioner initially performed his bounded duty.")

The counterclaim asserted by King here is precisely the type of action permitted by the cases cited above; that is, an action to recover moneys that have been erroneously paid to the State by King and that do not rightfully belong to the

State. As set forth in the counterclaim, King has erroneously overpaid Medicaid rebates to the State since the first quarter of 2003. Those funds have never rightfully belonged to the State and should be returned to King. Because King does not seek "damages" or other remuneration to be paid from the State's treasury, but instead seeks only the return of funds that rightfully belong to it, King's counterclaim is not barred. Construing all doubts in King's favor and accepting all allegations in King's counterclaim as true, King has stated a viable claim for a refund of erroneous overpayments.

II. The state court's order dismissing King's counterclaim pursuant to the doctrine of exhaustion of administrative remedies should be vacated, because there is no allegation or evidence in the record that administrative remedies are available to King.

While the doctrine of exhaustion of administrative remedies has been recognized by *Patterson v. Gladwin Corp.*, 835 So. 2d 137 (Ala. 2002), the state court erred in dismissing King's counterclaim on that basis, because there was no evidence that King had access to any administrative remedies. The State's argument depends exclusively upon the terms of a sample agreement provided to the state court by the State's counsel at the May 19, 2006, hearing. The fact that the sample agreement was never in evidence, and is therefore unavailable as part of the record on a motion to dismiss, illustrates the myriad substantive and evidentiary problems with the state court's holding.

(A) The state court's order should be vacated, because the sample agreement was not in evidence and was unauthenticated, and the State's use of the sample agreement violated the best evidence and hearsay rules.

The sample rebate agreement relied upon by the state court in its order was never properly in evidence and was therefore not a part of the record in this case. The State never made any effort to properly authenticate and introduce the document as an exhibit in the case. Instead, the State's counsel merely handed a copy of the document, which had not been plead or otherwise previously disclosed to King, to the judge during oral argument. It was improper for the state court to dismiss King's counterclaim in reliance upon a document that was never in evidence. *Reed v. Rhodes*, 607 F.2d 714, 735 (7th Cir. 1975) ("District Judge was in error in employing any evidence dehors the record except in compliance with Rule 201 of the Federal Rules of Evidence.").

Moreover, even if the State had made any attempt to introduce the sample rebate agreement, it would have been error for the state court to admit the document or to rely upon it in dismissing King's claims. FED. R. EVID. § 901 and ALA. R. EVID. § 901 provide that a party offering a writing as evidence must authenticate or identify the writing "as a condition precedent to admissibility." FED. R. EVID § 1002 and ALA. R. EVID. § 1002 provide that "to prove the content of a writing, the original writing is required." FED. R. EVID. § 802 and ALA. R. EVID. § 802 preclude hearsay evidence. "'Hearsay' is a statement, other than one

made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. FED. R. EVID. § 801; ALA. R. EVID. § 801.

The sample agreement provided to the state court at the May 19, 2006, hearing was never authenticated. It was presented directly to the judge by the State's counsel and no attempt was made to authenticate it by testimony or otherwise. Therefore, its use at the hearing was in violation of Rule 901. Furthermore, the sample agreement violated the Best Evidence Rule, FED. R. EVID. § 1002 and ALA. R. EVID. § 1002, because it was an unsigned, sample document, presented to show a purported contract between the State and King and no attempt was made by the State to account for the unavailability of the original. Finally, the use of the sample agreement at the May 19, 2006, hearing constituted impermissible hearsay in violation of FED. R. EVID. § 802 and ALA. R. EVID. § 802. The sample agreement is a written statement made out of court offered to prove the truth of the matter asserted, i.e. that contractual, administrative remedies were available to King and that King failed to exhaust them before filing its counterclaim. Since the Sample Agreement was not properly authenticated and since its use violates the best evidence and hearsay rules, the state court erred in dismissing King's counterclaim.

(B) The state court's order is due to be vacated, because the sample agreement does not amount to a contract between the State and King.

"No contract can be formed without an offer, acceptance, consideration, and mutual assent to the terms essential to the contract." *Ex Parte Holland Manufacturing Co.*, 689 So. 2d 65, 66-67 (Ala. 1996) (unsigned blanket purchase order alone could not establish mutual asset to contract term excluding defendant from liability). The sample agreement presented by the State's counsel at oral argument was merely that — a sample. It was unsigned. Neither King's name nor the State's name even appeared anywhere in the sample agreement. Construing all doubts in King's favor, the sample agreement cannot be deemed as a contract between the State and King. Because the sample agreement cannot represent a binding contract, any administrative remedy provision contained therein cannot be enforced against the parties. Therefore, the state court erred in using the sample agreement to infer contract terms to King as a basis for applying the doctrine of exhaustion of administrative remedies and dismissing King's counterclaim.

(C) The state court's order is due to be vacated, because the sample agreement does not provide an administrative remedy applicable to King's counterclaim.

Even if the sample agreement had been properly admitted and could be considered as evidence of a binding contract (which it was not and can not), the sample agreement does not govern the issues raised in the counterclaim filed by

King. First, the sample agreement defines Medicaid Utilization Information ("MUI") as follows:

> I. DEFINITIONS
>
> (n) "Medicaid Utilization Information" means the information on the total number of units of each … Manufacturer's … Drugs … The Medicaid Utilization Information to be supplied includes: 1) NDC number; 2) Product name; 3) Units paid for during the quarter by NDC number; 4) Total number of prescriptions paid for during the quarter by NDC number; and 5) Total amount paid during the quarter by NDC number.
>
> (Sample Agreement, p. 3-4.)

"NDC" is the National Drug Code for each drug as further defined in Section I. (o) and "Unit" represents each tablet or capsule of a manufacturer's drug, defined at Section I. (cc).

Section I. (dd) "Unit Rebate Amount" is defined as follows:

> "Unit Rebate Amount" means the Unit amount computed by the Health Care Financing Administration to which the Medicaid utilization information may be applied …

The State relies upon Section V entitled: "Dispute Resolution – Medicaid Utilization Information," and that Section V provides in part the following:

> (a) In the event that in any quarter a discrepancy in the **Medicaid Utilization Information** …
>
> (b) If the Manufacturer in good faith believes the State Medicaid Agency's **Medicaid Utilization Information** is erroneous …

> (c) The State and the manufacturer will use their best efforts to resolve the discrepancy [in the Medicaid Utilization Information] …
>
> (d) Nothing in this section shall preclude the right of the Manufacturer to audit the **Medicaid Utilization Information** reported (or required to be reported) by the State.

This Dispute Resolution – Medicaid Utilization Information Section V of the Sample Rebate Agreement is applicable to disputes regarding the Medicaid Utilization Information which is a defined term in the Sample Agreement. Those disputes would include NDC numbers, product name, units, number of prescriptions and amount reimbursed by the State during any quarter. King does not and has never challenged the Medicaid Utilization Information from the State of Alabama regarding the number of units reimbursed by the State. The counterclaim has absolutely nothing to do with the Medicaid Utilization Information including the NDCs, product name, and the units reimbursed by the State and paid to the pharmacies.

King hereby confirms to the Court that it does not challenge the Medicaid Utilization Information in its counterclaim against the State.

No "discrepancy" in the Medicaid Utilization Information exists and no "dispute" in the Medicaid Utilization Information exists. Thus, Section V entitled Dispute Resolution – Medicaid Utilization Information is not applicable to the Counterclaim filed by King.

The only other administrative remedy provided in the Sample Agreement is contained in Section VI, entitled "Dispute Resolution -- Prescription Drugs Access and State Systems Issues." That Section expressly deals with "[a] State's failure to comply with the drug access requirements of section 1927 of the Act." There is no such issue raised by King's Counterclaim.

King's counterclaim alleges that King has overpaid the State a liquidated amount of monies and is entitled to receive its liquidated overpayment back from the State. These liquidated monies do not belong in the coffers of the State or the Treasury of the State. Because those overpayments do not belong to the State, they may be litigated and required to be returned to King by this Court.

Section V of the sample agreement itself is clear and unambiguous. Overpayment as claimed by King in the counterclaim does not involve MUI. Overpayments are not mentioned in Section V of the sample agreement and are not required by the terms of the sample agreement to be resolved by ADR or administrative proceedings. Here (assuming that the State and King are parties to the sample agreement, which they are not), the parties have expressly, and narrowly, defined the types of disputes to which the administrative remedies provisions are to be applied – namely discrepancies or disputes involving MUI. If the parties had desired that other types of disputes, such as the one raised by King's

counterclaim, be subject to the administrative remedies provisions, they certainly could, and would, have so provided.

Courts cannot construe a contract to create an implied term which would be inconsistent with the express terms of the contract. *See Bailey v. Liberty Mutual Ins. Co.*, 451 So. 2d 279, 281 (Ala. 1984). Accordingly, the Alabama Supreme Court has repeatedly refused to expand alternative dispute resolution agreements beyond their express terms. *See Prudential Securities Inc. v. Micro-Fab, Inc.*, 689 So. 2d 829, 831 (Ala. 1997) ("This Court has applied the well-settled rule that the enforcement of arbitration agreements, while favored by Federal Law as sound public policy, must be governed by the plain terms of the agreements themselves -- that the courts are not to twist the language of a contract to achieve a result favored by federal policy but contrary to the intent of the parties."). Courts should, therefore, consider only the plain language contained in the contract when construing Alternative Dispute Resolution contract provisions. *See id*. Since the sample agreement does not provide an administrative remedy for overpayments as claimed by King in its counterclaim, the state court erred in finding that King's counterclaim was barred by the doctrine of exhaustion of administrative remedies.

Accordingly, accepting the allegations in King's counterclaim as true and construing all doubts in King's favor, it cannot be said that King could prove no set

of circumstances that would entitle it to relief. The state court's order dismissing King's counterclaim is, therefore, due to be vacated.

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/s/ Lisa W. Borden
One of the Attorneys for Defendants
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Monarch Pharmaceuticals, Inc.

EXHIBIT A

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

STATE OF ALABAMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CV –05-219**
	)	
ABBOTT LABORATORIES, INC.; et al.,	)	
	)	
Defendants.	)	

MOTION TO DISMISS COUNTERCLAIM OF DEFENDANTS KING PHARMACEUTICALS, INC. AND MONARCH PHARMACEUTICIALS, INC.

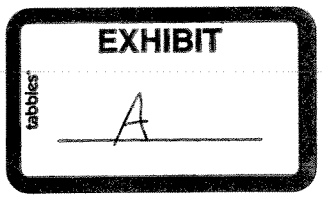
Plaintiff, State of Alabama, hereby moves this Court to dismiss the Counterclaim of Defendants King Pharmaceuticals, Inc. and Monarch Pharmaceuticals, Inc. (collectively referred to as "King") pursuant to Rules 12(b)(6) and 13(d) of the Alabama Rules of Civil Procedure, as well as the Alabama Constitution. As further grounds for said Motion, the State shows unto the Court as follows:

STANDARD OF LAW

Rule 12(b)(6) of the Alabama Rules of Civil Procedure states in pertinent part as follows:

> Every defense, in law or in fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim or third party claim, shall be asserted in the responsive pleading if one is required, except that the following defenses may at the option of the pleader be made by motion:...(6) failure to state a claim upon which relief can be granted.

A Complaint can be dismissed if it appears that the Plaintiff can prove no set of facts in support of the claim which would entitle Plaintiff to relief upon some cognizable law. *Barton v. Alabama Electric Cooperative*, 487 So.2d 884 (Ala. 1986).



Rule 13(d) of the Alabama Rules of Civil Procedures states as follows:

> *Counterclaim against the State of Alabama.* These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the State of Alabama or an officer or agency thereof.

LEGAL ARGUMENT

The State of Alabama Enjoys Complete Sovereign Immunity, Thereby Barring Any Recovery by King From The Counterclaim.

It is well settled under Alabama law that the State of Alabama is immune from suit. "The State is immune from suit and its immunity cannot be waived by the legislature or by any other State Authority." *Druid City Hospital Board v. Epperson*, 378 So.2d 696 (Ala. 1979). In *Liberty National Life Insurance Company v. University of Alabama Health Services Foundation, P.C.*, 881 So.2d 1013 (Ala. 2003), the Alabama Supreme Court analyzed the State's immunity as follows:

> Recently, this Court restated long-settled principles concerning the immunity of the State of Alabama from suit and the precedent, firmly supported by the doctrine of stare decisis, which holds that an action contrary to the State's immunity is an action over which the courts of this State lack subject matter jurisdiction. The long-standing legal principle of state sovereign immunity is written into Alabama's Constitution. Article I, § 14, Alabama Constitution of 1901, provides that the State of Alabama shall never be made a defendant in any court of law or equity. Under the provision, the State and its agencies have absolute immunity from suit in any court. Neither the State nor the Alabama State Port Authority has the power to waive that immunity. It is familiar law in this state that § 14 wholly withdraws from the Legislature, or any other state authority, the power to give consent to a suit against the state. This Court has recognized the almost invincible wall of the state's immunity as established by the people through their Constitution. Therefore, it is clear that neither the Legislature nor the State Docks had the power to waive, either expressly or impliedly, the state's immunity under § 14 and thereby consent to a

> damages action against the state. We have held that the circuit court is without jurisdiction to entertain a suit against the State because of Sec. 14 of the Constitution. And this Court has said that it will take notice of the question of jurisdiction at any time or even ex mero motu. Therefore, it appears that a trial court or appellant court should, at any stage of the proceedings, dismiss a suit when it becomes convinced that it is a suit against the State and contrary to Sec. 14 of the Constitution. This constitutionally guaranteed principle of sovereign immunity, acting as a jurisdictional bar, precludes a court from exercising subject-matter jurisdiction. Without jurisdiction, a court has no power to act and must dismiss the action. The question of jurisdiction is always fundamental, and if there is an absence of jurisdiction over either the person, or the subject matter, a court has no power to act, and jurisdiction over the subject matter cannot be created by waiver or consent.

Liberty National Life Insurance Company v. University of Alabama Health Services Foundation, P.C., 881 So.2d at 1026-1027 (internal citations omitted).

King's counterclaim is clearly against the State of Alabama and the State of Alabama only[1]. Accordingly, the State is entitled to sovereign immunity. Furthermore, none of the counts set forth in the Counterclaim state a claim under which relief can be granted to King.

Under Rule 13(d) of the Alabama Rules of Civil Procedure, it is clear that a counterclaim against the State is disallowed. The Alabama Supreme Court has long held that the State cannot be made a Defendant in a counterclaim. "Under Sec. 14 of the Constitution of Alabama of 1901, the State cannot be made a defendant in any court of law or equity in this provision of the Constitution is as applicable to cross bills seeking affirmative relief against the State as to original bills." *State v. Gill*, 29 Ala. 77, 66 So.2d 141 (1953). "The State is as immune from counterclaims seeking affirmative relief as it

[1] See Answer, Defenses and Counterclaim of Defendant's King Pharmaceuticals, Inc. and Monarch Pharmaceuticals, Inc to the State of Alabama's Second Amended Complaint at page 46, "King incorporates its answer and defenses as set forth above and submits the following for its counterclaim against the State of Alabama."

is from original complaints." *Virginia Sarradett v. University of South Alabama Medical Center*, 484 So.2d 426, 427 (Ala. 1986, citing State v. Gill, supra; *Alabama Girls Industrial School v. Reynolds*, 143 Ala. 579, 42 So.2d 114 (1904).)

CONCLUSION

King's counterclaim names only the State of Alabama as a Defendant. Pursuant to well-established case law, the State of Alabama is immune from suit. This immunity clearly applies to counterclaims. Accordingly, the King counterclaim is due to be dismissed because it fails to state a claim upon which relief can be granted.

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CERTIFICATE OF SERVICE

I hereby certify that I have on this the 1st of March, 2006, electronically served a true and correct copy of the foregoing pleading on counsel of record by transmission to LNFS, pursuant to Case Management Order No. 2.

OF COUNSEL

EXHIBIT B

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

STATE OF ALABAMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CV 2005-219
	)	
ABBOTT LABORATORIES, INC.; et al.,	)	
	)	
Defendants.	)	

OPPOSITION OF DEFENDANTS KING PHARMACEUTICALS, INC. AND MONARCH PHARMACEUTICALS, INC. TO PLAINTIFFS' MOTION TO DISMISS COUNTERCLAIM

Defendants King Pharmaceuticals, Inc. and Monarch Pharmaceuticals, Inc. (collectively "King"), submit the following in opposition to the State of Alabama's motion to dismiss King's Counterclaim:

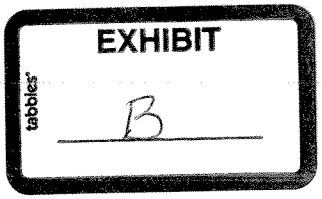
In its motion, the State argues that it is entitled to the absolute protection of sovereign immunity. While it is true that Sec. 14 of the Alabama Constitution of 1901 provides that "the State of Alabama shall never be made a defendant in any court of law or equity," and that Alabama's courts have observed that "the wall of immunity erected by Sec. 14 is *nearly* impregnable . . . ." *E.g., Alabama A&M Univ. v. Jones*, 895 So.2d 867, 872-73 (Ala. 2004)(emphasis added), there are indeed limited exceptions to the sovereign immunity of the State.

In *Aland v. Graham*, 250 So.2d 677 (Ala. 1971), the Court listed four general categories of cases which are not barred by Sec. 14:

(a) Actions brought to compel State officials to perform their legal duties;

(b) Actions brought to enjoin State officials from enforcing an unconstitutional law;

(c) Actions to compel State officials to perform ministerial acts; and



(d) Actions brought under the Declaratory Judgments Act, seeking construction of a statute and how it should be applied to a given situation.

The *Aland* court expressly recognized that this list might not be exhaustive. Other opinions indicate that an action for repayment of moneys erroneously paid to the State is not barred by Sec. 14.[1] For example, in *Alabama Dept. of Environmental Mgmt. v. Town of Lowndesboro*, 2005 WL 791239 (Ala. Civ. App. 2005), Presiding Judge Crawley, concurring specially, expressly recognized that "[i]n appropriate circumstances, Sec. 14 does not bar a proceeding against the State for the recovery of moneys that do not belong to the State . . . ." A number of cases have allowed suits seeking such repayments. In *Dept. of Industrial Relations v. West Boylston Mfg. Co.*, 42 So. 2d 787 (Ala. 1949), the Alabama Supreme Court permitted recovery of a refund of contributions to the unemployment-compensation fund. *See also, Glass v. Prudential Ins. Co. of America*, 22 So. 2d 13 (1945)(statute requiring that taxes paid under protest be held in trust pending determination of their legality did not violate Sec. 14); *Ex parte McCurley*, 412 So.2d 1236 (Ala. 1982)(sovereign immunity did not bar a judgment requiring the State to return fines and costs that it had imposed on a criminal defendant after her conviction was reversed on appeal); *Horn v. Dunn*, 79 So. 2d 11 (1955)("No judgment against the State was sought or granted. True, the decree may ultimately touch the State treasury. Yet, the State treasury suffers no more than would, had the Commissioner initially performed his bounded duty.)

The Counterclaim asserted by King here is precisely the type of action permitted by the cases cited above; that is, an action to recover moneys that have been erroneously paid to the

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[1] In the *ADEM* case, the court declined to allow an award of attorneys' fees. The concurrence distinguished that situation from the cited cases, noting that "the award of attorney fees in this case, [] would be paid from the State treasury and not from funds that were improperly collected . . . ." and would "result in the type of direct affect on the financial status of the state treasury that is prohibited by Sec. 14."

State by King. As set forth in the Counterclaim, King has overpaid Medicaid rebates to the State since the first quarter of 2003. Those funds have never rightfully belonged to the State, and should be returned to King. Because King does not seek "damages" or other remuneration to be paid from the State's treasury, but instead seeks only the return of funds that rightfully belong to it, King's Counterclaim is not barred.

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Certificate of Service

I hereby certify that the foregoing Opposition of Defendants King Pharmaceuticals, Inc. and Monarch Pharmaceuticals, Inc. to State's Motion to Dismiss Counterclaim has been served upon all counsel of record via electronic transmission to LNFS, pursuant to the Court's Case Management Order No. 2, this 24th day of March, 2006.

Attorney for Defendants

EXHIBIT C

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR MONTGOMERY COUNTY
MONTGOMERY, ALABAMA

STATE OF ALABAMA,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	CV-2005-219-PR
	)	
ABBOTT LABORATORIES, INC., et al.	)	
	)	
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS
FRIDAY, MAY 19, 2006
COURTROOM 4-C
BEFORE THE HONORABLE CHARLES PRICE
PRESIDING CIRCUIT COURT JUDGE

APPEARANCES:

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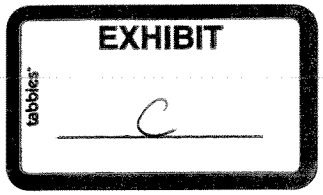


(The following proceedings occurred before the Honorable Charles Price, Presiding Circuit Court Judge, in regard to the above-styled cause, commencing on Friday, May 19, 2006:)

THE COURT: State of Alabama versus Abbott Laboratories. Motion to dismiss.

State your name, starting over here, and who you represent.

MR. BLAIR: Sam Blair. I'm from Memphis, Tennessee.

THE COURT: You represent --

MR. BLAIR: And we represent King with Lisa Borden.

THE COURT: Okay. King. All right.

MR. CARTER: Good morning, Your Honor. Clint Carter with Beasley Allen for the State.

THE COURT: Okay.

MR. BATES: Good morning, Your Honor. Roger Bates with Hand Arendall for the state.

THE COURT: All right.

MR. MILES: Dee Miles, Beasley Allen for the State.

THE COURT: Who is representing Monarch?

MR. BLAIR: We do.

THE COURT: Okay. You're representing both King and Monarch?

MR. BLAIR: Yes, Your Honor.

THE COURT: All right. You have a motion to dismiss and a counterclaim. All right.

State your motion.

MR. BLAIR: It's actually our counterclaim and their motion.

THE COURT: Okay. Your motion.

MR. CARTER: That's right, Judge. This case is in the posture where King has filed a counterclaim to our complaint. We have filed a motion to dismiss King's counterclaim.

As the Court is aware, this case arises from the State's initial filing of a fraud case against 79 pharmaceutical manufacturers for the intentional inflation of the average wholesale price. In essence, the case from the State's side is that the defendants have intentionally misrepresented a price there which the State relied upon, causing the Alabama State Medicaid agency to overpay.

In response to that, King filed a counterclaim. The counterclaim on its face without question is against the State of Alabama.

Our threshold defense and our threshold reason for this Court to dismiss the counterclaim is that it is a direct action against the State. And as this Court is well-aware, Section 14 of the Alabama Constitution precludes any and all direct actions against the State for money. So from the threshold issue, we say the counterclaim is due to be dismissed because it's in violation of Section 14 of the Constitution.

Now, the Alabama Supreme Court has said that this bar on filing suits against the State is nearly impregnable, which I take to mean that King's argument is the almost pregnant argument because there are some few, limited exceptions to when the State can be sued. And they're set forth in the briefs, and they are this:

Actions brought to compel state officials to do their official duties. The counterclaim does not fall under those parameters.

Actions brought to enjoin State officials from enforcing an unconstitutional law. No allegation is made for that exception in King's counterclaim.

Actions to compel State officials to perform ministerial acts is an exception. No allegation

for that is made in King's counterclaim.

And actions for declaratory judgments are listed. No action for that is mentioned in King's counterclaim.

So as a threshold issue, it's a direct action against the State. It's barred by the constitution. The Alabama Supreme Court has recognized four narrow exceptions, none of which apply to King's counterclaim.

So what King is asking this Court to do is either overrule the Alabama State Constitution or judicially create a new exception to the Alabama State Constitution. And we submit to this Court based on the case law in our brief that this is plain and simple, a direct cause of action against the State for money, which is precluded by the state constitution.

The fact that it's a counterclaim, Judge, does not at all change the analysis.

THE COURT: All right.

MR. CARTER: The case law submitted in our brief says it's very clear for a direct action or counterclaim, it's barred by the State.

THE COURT: All right. What says the defense?

MR. BLAIR: We're going to break up the argument, Your Honor. I'm going to tell you the factual background so you can understand what our claim is about. The factual background is real simple; it's this:

King is requested to pay rebates by the State. The State actually pays reimbursements to the pharmacy when they sell a drug. And I want to try to go through an example so you can understand. Say a pill costs a dollar. We sell it to a wholesaler, and they probably paid -- they pay 98 cents. They get a 2 percent discount. The pharmacist buys that drug, tells the State, "We sold this drug to a Medicaid beneficiary." The State pays the pharmacist for that reimbursement, WAC plus 9.2 percent or AWP minus 10.

Now, they talk about this AWP fraud case, but the State has the option to pay either way. And actually, Alabama pays WAC plus 9.2. So in other words, they pay a dollar plus 9.2 cents. So they pay a dollar and nine cents.

Then they ask King to pay a rebate. And that's what this counterclaim is about. They ask us to pay a rebate, and the rebate is typically

calculated as average manufacturer price, which would be very simply, the 2 percent discount. So it would be 98 cents. You have to multiply 15.1 percent times that. So roughly 15 cents would be a normal rebate. So King would pay the State 15 cents.

Except in this case, King has had to pay a lot more. And, in fact, sometimes more than the reimbursement amount. King made some errors in its -- actually, it's in their complaint -- they made some errors in their rebate calculations.

One of the errors they made was just a -- I'll say, it was a dumb error. They sold to U.S. Surgical -- excuse me -- U.S. Prison Services drugs. And they thought they were a governmental entity. And so they sold them drugs. And these are round numbers; it's jut by way of example. But instead of selling them for a dollar or 98 cents, they would sell the drug for 50 cents. They thought they were a governmental entity.

Well, there are two ways to calculate a rebate. One is 15 percent AMP, which would in that example would produce roughly a 15 percent rebate.

Or another way is that you would take the AMP

and subtract the best price so that you would sell to a commercial company. Well, King didn't think U.S. Prison Services was a commercial company, so they didn't include that in their calculation.

In fact, it is a commercial company; it's not a governmental entity. So their best price is 50 cents. So 98 cents minus 50 cents. And the rebate should be 48 cents, not 15 cents.

So the government investigated King. King has agreed to a settlement that at the time of our answer and counterclaim wasn't complete, but it is now complete. Our settlement produced -- get this -- a hundred-and-twenty-something-million-dollar payment during this investigation. So we have two things to talk about; that plus the next three years. That settlement represents payments from 1994 to -- through 2002.

Not only did we pay $120 something million, but actually the calculation was, we underpaid $60 something million. The agreement was, we had to pay double. The difference in 15 cents and 48 cents is 33 cents. We pay double, so we paid an extra 66 cents for this drug from 1994 to 2002 to everybody, including the State of Alabama.

We have an agreement with the State of Alabama that Troy King signed, and it says, among other things, that we're paying this money, and the State gets 2.5 -- 2.4 something, almost $2.5 million. From the first quarter of 2003 through 2005, while they were being investigated, King goes, We're not to going to make anymore mistakes, so we're going to overpay the rebates to all the states, including Alabama." And that's what the counterclaim is about.

And we admittedly overpaid it. And the statement -- and the CMS, the federal arm of HSS that runs the Medicaid-Medicare program, they know we overpaid. So in the settlement agreement it says that King has used a methodology that resulted in -- It says, King is overpaying its quarterly rebates to Medicaid and to state rebate programs. "Nothing in this agreement shall limit King's right to recover those overpayments from the State."

This is the agreement with Alabama and King. So there's no doubt we've overpaid for the last three years. No doubt whatsoever. And we're talking about maybe substantial money. Sometimes our rebates -- and I know this is hard to

believe -- our rebates exceed the entire cost of their reimbursement. Their cases that they paid too much, we've already paid them more in these 3 years for some drugs than they paid. They made money on these drugs.

So with that factual background, I wanted you to realize there's no doubt we've overpaid. And in this agreement that we didn't really have too much say in what was put in the agreement, it's acknowledged that we overpaid for these last three years. And those are the overpayments we want to get back.

And I think Ms. Borden is going to talk about the law to give you -- I wanted to give you the factual background. She's going to talk about the law.

MS. BORDEN: The State argues that this claim is barred by sovereign immunity. And, certainly, we recognize that as Mr. Carter said in almost every case, the State is immune from suit.

The four exceptions that he mentioned are certainly not the sole and only exceptions that the court has recognized exist. In fact, the case from which those exceptions came -- and they're cited in our opposition to the motion -- is the

case of *Aland v. Graham*, in which the Alabama Supreme Court considered a case and decided that those four exceptions which were the only ones that might arguably had applied in that case, didn't apply. But what it said was that without professing to cover every situation that might have arisen, there are four general categories. And it listed those categories that Mr. Carter mentioned.

But in a number of other cases, the court has also recognized that there are other exceptions. And the particular one that we're concerned with here is that a number of cases have recognized that where for some reason there has been an erroneous payment of money to the State, an overpayment, a payment that shouldn't have occurred at all, then the State is bound to give that money back. And those claims are not barred by sovereign immunity.

And as mentioned in our opposition, for example, in a recent case, the *Alabama Department of Environmental Management v. the Town of Lowndesboro*, again, a case in which the court decided that the particular exceptions did not apply in that case, the court in a concurrence

discussed the fact that sovereign immunity does not bar a proceeding against the State for moneys that do not belong to the State or that have not been properly acquired by the State.

And the court in concurrence there listed a number of cases that support that proposition. In addition, there's a -- there was a case cited in our opposition, *Ex parte McCurley*, a fairly old case, 1982, in which the complainant was convicted of selling a drug and paid a fine and court costs. Later on on appeal, it was determined that the drug that she was convicted of selling hadn't actually been classified as a controlled substance, and her conviction was overturned.

And she said, Well, now I want my fine and my court costs back because I was wrongly convicted. The State said, No, no. You can't claim that because we're immune from those kinds of claims. And what the court wound up saying was, No, immunity doesn't apply here because this is simply an erroneous payment. It's not money that's coming from the treasury. It's not money that is making a direct effect on the treasury as those sovereign immunity cases say is barred. It's simply money that has come into possession of the

State erroneously, and there's no bar --

THE COURT: All right.

MS. BORDEN: -- to the State being required to give that money back.

THE COURT: Mr. Carter, if the claim -- if the counterclaim is to recover money that they claim have been overpaid to the State, that's not a suit against the State for money on a complaint saying that you have caused some injury or some tort of some contract. It's just a claim that you're overpaid, we have a right for a refund.

MR. CARTER: Except that there's a very specific administrative remedy that must be exhausted by the manufacturers before they can ever bring a claim for it. And that, Judge, is under federal law. The important thing that --

THE COURT: Federal law?

MR. CARTER: Federal law, exactly. The Medicare federal law. Everything they're talking about, their ability to get moneys back for rebate overpayment --

THE COURT: No, no no. If they have overpaid the State of Alabama by erroneously calculating or miscalculating some rebate or refunds, why -- how does federal law and the federal Medicaid Act

apply to simply claims that we overpaid you, whether they can prove it or not, and we're entitled to the money back?

MR. CARTER: Well, there's a big difference between what our lawsuit is about and rebates. Our lawsuit has absolutely nothing to do with rebates. We don't make any claim for rebates.

So when you talk about AWP and WAC versus rebates, you're already mixing apples and oranges.

THE COURT: So what you're saying -- You're saying their counterclaim should not be part of this suit. If they have a claim against the State of Alabama for the rebate, they can just file a lawsuit against the State of Alabama and make that claim, based upon the agreement that he said -- the lawyer said Troy King signed.

MR. CARTER: Except that they can't even file a lawsuit because right here, Judge, is a sample rebate agreement. May I approach?

THE COURT: Hold on a minute. I have to take a call.

(There was a brief interruption of the proceedings.)

MS. BORDEN: Judge, may I --

THE COURT: Let him finish.

MS. BORDEN: I wanted to object to it just for the record.

THE COURT: All right. On what grounds?

MS. BORDEN: It hasn't been pled. Their motion is based solely on sovereign immunity and failure to state a claim. They've not pled anything about this rebate agreement.

THE COURT: All right.

MS. BORDEN: It's not in the record.

THE COURT: Overruled. Go ahead.

MR. CARTER: Judge, let me approach and show you two things, if I may. One is the language of the counterclaim itself, which sets forth -- they cite right there the federal Medicaid law.

So the agreement between Alabama State Medicaid and King Pharmaceuticals with respect to the rebate agreement is governed by federal law. Specifically, it's governed by a rebate agreement.

And I'd like to supplement the record and have this rebate agreement introduced into evidence. But I want to show it to the Court. This is a sample. It applies to all rebate agreements between Alabama Medicaid and the pharmaceutical companies that pay rebates.

If you look at the rebate, Judge, on page 7,

Section V, the agreement very clearly sets forth a dispute resolution process. See where it says Medicaid Utilization Information? Mr. Blair was talking about, "Well, we paid on the wrong thing, we should have paid for this. We didn't pay for that." All of that is utilization. Utilization just means how much drugs are being bought and used. So when they pay a rebate, it's based on the utilization.

And this agreement says, manufacturer, if you have a disagreement or a complaint about how the rebate was calculated, you've got to go through this very specific dispute resolution process. There's no evidence that the dispute resolution process was followed in this case.

So it's our position that if you think the State of Alabama owes you money for rebates, then you have to go through the -- exhaust your administrative remedies -- and even then, Judge, it's a federal question lawsuit --

THE COURT: All right.

MR. CARTER: -- completely separate and apart.

And let me say this about the settlement, right quick: If they're saying the settlement is

some sort of bar, or has anything to do with our case that we filed over the AWPs and WACs, then they need to file the appropriate motion. It's not a counterclaim. It's not the appropriate vehicle to enforce this case.

THE COURT: All right. Go ahead.

MS. BORDEN: That's not what our counterclaim is about. We're not claiming that our settlement agreement bars their suit. Although, certainly, I don't want to suggest that rebate payments are not relevant ultimately to the damages, if any, that the State may have suffered. Because if they say they've overpaid, and yet we've paid them more than they have paid us, certainly, we think that's relevant. But that's not the counterclaim.

With respect to this agreement, if the Court will read the aspect of the agreement that's pointed out by Mr. Carter, what it deals with is a situation where the state provides utilization information on which we are to calculate rebate, and we say, "No, State, you're wrong, we don't owe you that much. Your information is wrong about the utilization." That's not this case either.

In this case what we're saying is, we, because of earlier errors in calculation, that

we -- that we concede were made, and for which we've now paid settlement, made a decision to overcalculate based on utilization information we were provided.

THE COURT: Well, then, what does this on page 8, "In the event the State and the manufacturer are not able to resolve the discrepancy within 60 days, CMS shall require the State to make available to the manufacturer the State hearing mechanism available under the Medicaid program." Now, what does that mean?

MS. BORDEN: Well, what I'm saying, Judge, is that applies to the situation where the -- where we dispute utilization information that the State's providing us and we're not able to work that dispute out. That's not this case.

We're not saying in any respect that Alabama's utilization information, which they tell us, you know, how much of a particular drug has been reimbursed, for example. We're not saying that we're disputing any of that information.

What we're saying is, that given that information, we have --

THE COURT: Well, it says, "The manufacturer shall pay the State Medicaid Agency that portion

of the rebate amount..." So this deals with rebate.

MS. BORDEN: Yes, sir, but only -- only in the circumstance where the issue is that there's some dispute about the utilization information on which the rebate's calculated.

THE COURT: Well --

MS. BORDEN: And there is no dispute.

THE COURT: Well, if your client has overpaid the State of Alabama, then my position is they have a right to try to get the money back. Now, the question is, what mechanism should they use to get the money back. Is it -- what's the name of that agency over there?

MS. BORDEN: CMS.

THE COURT: No, no. The one that you go before, the board.

MS. BORDEN: Oh. The Board of Authorization?

THE COURT: Adjustment --

MS. BORDEN: Board of Adjustment.

THE COURT: -- or here on the counterclaim, or a lawsuit based on these federal regulations. Just what mechanism should you use? And that's what I have to go through.

MS. BORDEN: Yes, sir.

THE COURT: Well, why shouldn't the counterclaim lie in this case?

MR. CARTER: The counterclaim shouldn't lie in this case because there is a specific administrative remedy that must be exhausted.

THE COURT: What is that administrative remedy?

MR. CARTER: It's set forth in this document I gave you.

THE COURT: She says that doesn't apply to rebates.

MR. CARTER: Well, we disagree with her position. We believe that this document, this rebate agreement governs any and all disputes over rebates between the Alabama Medicaid Agency and the manufacturers.

And I think that when she says that -- I guess their position is they don't dispute the utilization, they just paid wrong.

THE COURT: Well, now, this says, "that portion of the rebate amount." So it deals with rebate.

MS. BORDEN: I'm not saying that it doesn't deal with rebates. What I'm saying is, it specifies particular disputes about rebates that

it governs. It doesn't say this governs every dispute about a rebate.

THE COURT: Oh, I understand that.

MS. BORDEN: It says it governs particular --

THE COURT: But you have a -- you have a remedy. In the event that the State and the manufacturer is not able to resolve the discrepancy, the State hearing mechanism available under the Medicaid 42 -- or federal regulation, Section 447.253(c).

What is -- What does that regulation say?

MS. BORDEN: If I may, Judge, the discrepancy to which it refers is the one that's on page 7. And that's a discrepancy, a dispute between the State and the manufacturer about utilization information. And that is not what we have.

MR. BLAIR: Your Honor, may I say something? Maybe I can clarify this.

THE COURT: Yes.

MR. BLAIR: When they talk about utilization, the State will tell King, "We bought a thousand pills of Altace," our drug.

THE COURT: Yeah.

MR. BLAIR: "And you need to pay us rebates on a thousand pills."

THE COURT: Go ahead.

MR. BLAIR: That's utilization. We have never challenged utilization in the history of King. Not once has King challenged the State on you didn't sell a thousand pills -- or reimburse a thousand pills, you only reimbursed 500.

The reason that I know that is, we didn't have the computer software to do that. Some companies can do that.

THE COURT: All right.

MR. BLAIR: We can't because we weren't -- so we have never challenged utilization. And that's what this is talking about.

THE COURT: What we say -- we agree with everything you say, State. You say you reimbursed a thousand pills. We just miscalculated our rebate, and we overpaid it. So we say we can file this counterclaim.

MR. BLAIR: I do also make the point that we asked the State to make sure, don't file anymore briefs; don't file anymore cases. You know, I tried to get a scheduling order -- a briefing schedule. I got an agreement with them not to bring any new information into this hearing. And we get a new information in this hearing.

We haven't seen this sample. But it's not signed --

THE COURT: Is there a difference in a rebate and a rebate?

MR. BLAIR: There is a difference two ways: Once you take the utilization, you can calculate a rebate. Or to say we don't like to pay this rebate, we're going to say you didn't sell a thousand pills, you reimbursed 500 pills. So you can challenge it two ways. But rebates are rebates; you're right.

THE COURT: All right. Why shouldn't the counterclaim lie?

MR. CARTER: Because rebates deal with utilization. The agreement that I gave you deals with the remedies with respect to how they can go about recovering if they think they overpaid. But interestingly, the agreement I gave you talks about adjustments made in the future.

In other words, if King goes through the administrative process, and it's determined that, yes, King did overpay, then there is an agreement to adjust prices in the future. It doesn't address going backwards. And that's because we still, the State has immunity.

THE COURT: Well, it's not State immunity in that they are suing the State to get money from the treasury back the State has, and not owed.

What they're saying, "We overpaid you, so it's really not your money in the first place." So it's not invading the treasury. We're just suing to get our money back.

That's different than having a claim against the State for some alleged injury. And the State has to go into the treasury to get money that has not been overpaid.

All right. Anything else on King?

MS. BORDEN: No, sir.

THE COURT: How about Monarch?

MR. BLAIR: We're in the same boat.

THE COURT: Both of them are the same argument?

MR. BLAIR: Yes, sir.

THE COURT: All right. Thank you.

Anything else you want to put in the record?

MR. CARTER: Just, Your Honor, that we believe there's an administrative process in place that King must follow before they can file a direct action or a counterclaim against the State. And we still believe that the counterclaim is

barred by sovereign immunity.

THE COURT: All right. Thank you.

Now --

Yes?

MR. BATES: You haven't heard from me today. I wanted to make just one comment.

Notwithstanding this idea about not submitting cases and so forth. I think it would be instructive to the Court, and I'd like to get it for you, the Patterson decision, which you may remember. It was a taxpayer lawsuit when they filed a class action trying to get refunds directly from the State treasury without going through the administrative process to seek refunds through the proper revenue.

THE COURT: Well, yeah, but --

MR. BATES: That case said you can't do it until you go through the administrative process was my point.

THE COURT: Yeah, but under the Code, the Revenue Code, they set up exactly how you're supposed to file and exhaust the administrative remedies, etc.

MR. BATES: Yes, sir.

THE COURT: That's a little different than

this, isn't it?

MR. BATES: I don't think so. Because I think this agreement that Mr. Carter gave you prescribes that very process between Medicaid and the manufacturers. If we could submit that one case to you, Your Honor.

THE COURT: Yeah, you can submit it.

All right. Anything else?

MS. BORDEN: Just an opportunity to respond to whatever they're going to say about that.

THE COURT: That will be fine.

Now, are the representatives of all of these cases here; Coleman, Richard Gill, and others? I have to get all of these cases on schedule. All of these cases are together, so I have to get them on schedule.

Where is Richard Gill and Coleman, representing the class -- all of the pharmaceutical companies?

MS. BORDEN: Judge, I don't think --

THE COURT: I know they were not coming today for this purpose, because these are specific orders -- motions.

MR. BLAIR: They're aware of the schedule.

THE COURT: Well, they're --

MR. BLAIR: Well, it just involved King. I don't think anybody else cared.

THE COURT: Well, that's true. And I understand that. King and Monarch. In fact, one of them called, and said, "Judge, that motion doesn't -- that's just King an Monarch, it doesn't involve the whole group."

MR. BLAIR: King and Monarch are pretty unique.

THE COURT: Yeah. So what I think we need to do, then, is put the law clerk with you all, and y'all get a trial date for all these cases; all of them go together; way out some place, and start working back so we can get the special masters involved, and see what we need to do on this case. Because otherwise, they're just going to sit around. And that's not going to happen.

So are y'all ready to do that, although Coleman and Gill are not here?

MR. BLAIR: There are 79 defendants, and I don't want to speak --

THE COURT: Well, yes, and they all go together. You know, I'm going to give you a trial date outside, and then --

MR. BUTLER: Judge?

THE COURT: Yes.

MR. BUTLER: I'm here for the Pfizer Company just for observance of this hearing.

THE COURT: Right.

MR. BUTLER: But it will be the position, I think, of all the defendants that there shouldn't be just one trial.

THE COURT: Well, it's going to be one trial.

MR. BUTLER: Sir?

THE COURT: Just one trial. All of these matters -- one trial. I'm not setting 79 separate trials. That's just absolutely not what I'm going to do.

MR. BUTLER: Well, we want an opportunity to address that issue.

THE COURT: Well, you'll have an opportunity to address it.

Yes.

MR. MORRISS: Your Honor, Chad Morriss, I represent Merck. And we certainly take the position that before the Court sets a trial date, we'd like an opportunity to be heard on the issue of whether it will be one trial or 79 trials. And I don't think this is the appropriate venue to do that.

THE COURT: All right. Well, I need to set a matter -- a scheduling conference a couple of weeks from now that all lawyers of record have to be here. And that's the way we'll do it.

MR. BUTLER: That will be good.

THE COURT: All right. Thank you.

(The proceedings in the above-referenced case were concluded.)

C E R T I F I C A T E

STATE OF ALABAMA)

MONTGOMERY COUNTY)

I, Denise L. Gordon, Official Court Reporter of the Fifteenth Judicial Circuit, do hereby certify as follows:

That I reported in shorthand the foregoing proceedings in the foregoing styled cause at the time and place stated heretofore;

That I later reduced my shorthand notes to computer-aided transcription, and the foregoing pages numbered 2 through 29, both inclusive, contain a full, true, and correct transcript of the proceedings and testimony as herein set out;

That I am neither of kin or of counsel to the parties to said cause, nor in any manner interested in the results thereof.

Done this 23rd day of May, 2006.

/s/Denise L. Gordon
Official Court Reporter

EXHIBIT D

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

STATE OF ALABAMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CV 2005-219
	)	
ABBOTT LABORATORIES, INC.; et al.,	)	
	)	
Defendants.	)	

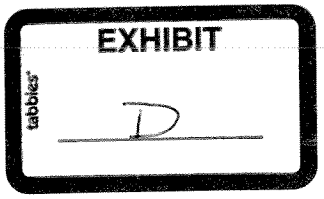
SUPPLEMENTAL OPPOSITION OF DEFENDANTS KING PHARMACEUTICALS, INC. AND MONARCH PHARMACEUTICALS, INC. TO PLAINTIFFS' MOTION TO DISMISS COUNTERCLAIM

Defendants King Pharmaceuticals, Inc. and Monarch Pharmaceuticals, Inc. (collectively in the singular "King"), submit the following supplemental opposition to the State of Alabama's motion to dismiss King's Counterclaim:

Introduction

At the May 19 hearing on the State's Motion to Dismiss, the State raised a previously unasserted argument that it alleges requires dismissal of King's counterclaim. Specifically, the State argues that King cannot pursue its counterclaim because it has failed to exhaust an administrative remedy that it alleges is provided in a rebate agreement between King and the State. Plaintiff's counsel provided the Court with a "Sample" Rebate Agreement ("Sample Agreement") containing the alleged administrative remedy language and cited *Patterson v. Gladwin Corp.*, 835 So. 2d 137 (Ala. 2002) [1] in support of its assertion that King's counterclaim should be dismissed. Regardless of the last minute authority raised by the State in their oral

[1] King's counsel for approximately six (6) weeks made numerous efforts prior to the hearing to obtain plaintiff's counsel's agreement to a briefing schedule, and to ascertain whether the State intended to cite any additional authorities to which it might need to be prepared to respond. On May 5, 2006, Plaintiff's counsel assured King that there was no need for a briefing schedule, and that "we do not plan to submit any further briefs or cases to the Court regarding the hearing set for May 19, 2006." (Letter from Clint Carter to Sam Blair dated May 5, 2006 (attached hereto as **Exhibit A**).



rebuttal argument, and to the extent King is able to respond within the one week period the Court allowed, without resort to discovery, King responds as follows:

Sample Rebate Agreement Is Not Applicable to the Counterclaim

There are several fatal technical, substantive and procedural problems with the Sample Agreement tendered to the Court at the hearing during the State's rebuttal argument, but King prefers to challenge the substance of the Sample Agreement first. Without waiving the technical arguments below, it is clear that the Sample Agreement does not govern the issues raised in the Counterclaim filed by King. First, the Sample Agreement defines Medicaid Utilization Information ("MUI") as follows:

> I. DEFINITIONS
>
> (n) "Medicaid Utilization Information" means the information on the total number of units of each … Manufacturer's … Drugs … The Medicaid Utilization Information to be supplied includes: 1) NDC number; 2) Product name; 3) Units paid for during the quarter by NDC number; 4) Total number of prescriptions paid for during the quarter by NDC number; and 5) Total amount paid during the quarter by NDC number.
>
> (Sample Agreement, p. 3-4.)

"NDC" is the National Drug Code for each drug as further defined in Section I. (o) and "Unit" represents each tablet or capsule of a manufacturer's drug, defined at Section I. (cc). (Sample Agreement, p. 4.)

Section I. (dd) "Unit Rebate Amount" is defined as follows:

> "Unit Rebate Amount" means the Unit amount computed by the Health Care Financing Administration to which the Medicaid utilization information may be applied …
>
> (Sample Agreement, p. 5.)

The State relies upon Section V entitled: "Dispute Resolution – Medicaid Utilization Information," and that Section V provides in part the following:

> (a) In the event that in any quarter a discrepancy in the **Medicaid Utilization Information** ...
>
> (b) If the Manufacturer in good faith believes the State Medicaid Agency's **Medicaid Utilization Information** is erroneous ...
>
> (c) The State and the manufacturer will use their best efforts to resolve the discrepancy [in the Medicaid Utilization Information] ...
>
> (d) Nothing in this section shall preclude the right of the Manufacturer to audit the **Medicaid Utilization Information** reported (or required to be reported) by the State.
>
> (Sample Rebate Agreement, p. 7-8.) (emphasis added).

It is clear that this Dispute Resolution – Medicaid Utilization Information Section V of the Sample Rebate Agreement is applicable to disputes regarding the Medicaid Utilization Information which is a defined term in the Sample Agreement. Those disputes would include NDC numbers, product name, units, number of prescriptions and amount reimbursed by the State during any quarter. King does not and has never challenged the Medicaid Utilization Information from the State of Alabama regarding the number of units reimbursed by the State. The Counterclaim has absolutely nothing to do with the Medicaid Utilization Information including the NDCs, product name, and the units reimbursed by the State and paid to the pharmacies.

King hereby confirms to the Court that it does not challenge the Medicaid Utilization Information in its Counterclaim against the State.

No "discrepancy" in the Medicaid Utilization Information exists and no "dispute" in the Medicaid Utilization Information exists. Thus, Section V entitled Dispute Resolution – Medicaid Utilization Information is not applicable to the Counterclaim filed by King.

As the Court correctly understood at the hearing, King has overpaid the State a liquidated amount of monies and is entitled to receive its liquidated overpayment back from the State.

These liquidated monies do not belong in the coffers of the State or the Treasury of the State. Because those liquidated funds do not belong to the State they may be litigated in this Court and required to be returned to King by this Court.

The only other administrative remedy provided in the Sample Agreement is contained in Section VI, entitled "Dispute Resolution -- Prescription Drugs Access and State Systems Issues." That Section expressly deals with "[a] State's failure to comply with the drug access requirements of section 1927 of the Act." Clearly, there is no such issue raised by King's Counterclaim.

The State is attempting to persuade this Court to find and imply terms in a contract that do not exist. Section V of the Sample Agreement itself is clear and unambiguous. Overpayment as claimed by King in the Counterclaim doe not involve MUI. Overpayments are not mentioned in Section V of the Sample Agreement and are not required by the terms of the Sample Agreement to be resolved by ADR or administrative proceedings. Here (assuming that the State and King are parties to the Sample Agreement), the parties have expressly, and narrowly, defined the types of disputes to which the administrative remedies provisions are to be applied – namely discrepancies or disputes involving MUI. If the parties had desired that other types of disputes, such as the one raised by King's Counterclaim, be subject to the administrative remedies provisions, they certainly could, and would, have so provided.

Courts cannot construe a contract to create an implied term which would be inconsistent with the express terms of the contract. *See Bailey v. Liberty Mutual Ins. Co.*, 451 So. 2d 279, 281 (Ala. 1984). Accordingly, the Alabama Supreme Court has repeatedly refused to expand alternative dispute resolution agreements beyond their express terms. *See Prudential Securities Inc. v. Micro-Fab, Inc.*, 689 So. 2d 829, 831 (Ala. 1997) ("This Court has applied the well-

settled rule that the enforcement of arbitration agreements, while favored by Federal Law as sound public policy, must be governed by the plain terms of the agreements themselves -- that the courts are not to twist the language of a contract to achieve a result favored by federal policy but contrary to the intent of the parties."). Courts should, therefore, consider only the plain language contained in the contract when construing Alternative Dispute Resolution contract provisions. *See id.*

Technical, Procedural and Substantive Issues

King objects to the new issue asserted by the State, which was issue was not pled or briefed prior to the hearing and did not form a basis for the State's Motion to Dismiss. The argument, as more fully discussed above, depends upon the terms of the Sample Agreement provided to the Court by plaintiff's counsel. Yet, the Sample agreement is outside the pleadings and should not provide a basis for dismissal.

Moreover, the Sample Agreement has not been properly entered in the record, as currently the Court has only counsel's unsworn assertions as to its applicability and its import. Such assertions do not substitute for proper testimony, and King has had no opportunity to rebut them with its own evidence.

In addition, the State cannot support its motion to dismiss on the basis of the Sample Agreement, a document that is outside the pleadings and not a part of the record upon which the Court should decide the motion. Because, as discussed below, there is a complete dearth of evidence concerning the applicability of the Sample Agreement, or any actual agreement, to the circumstances presented by King's counterclaim, the Court should simply ignore the Sample Agreement. If the State wishes to pursue such an argument, it should be required to do so by

way of a motion for summary judgment, and King should have a reasonable opportunity to take appropriate discovery and otherwise adequately respond.

The unsigned Sample Agreement provides no evidence concerning the terms of any binding contract between the parties. The Sample Agreement presented by plaintiff's counsel was merely a form that was not signed by any party, and which did not name King or any other defendant as a party to it. "No contract can be formed without an offer, acceptance, consideration, and mutual assent to the terms essential to the contract." *Ex parte Holland Manufacturing Co.*, 689 So. 2d 65, 66-67 (Ala. 1996) (unsigned blanket purchase order alone could not establish mutual assent to contract term excluding defendant from liability). As its name illustrates, the document submitted by the State at oral argument is merely a "sample." The Sample Agreement presented has not been executed by King. In fact, King's name does not even appear anywhere in the Sample Agreement.

The Sample Agreement purports to be an agreement between "The Secretary of Health and Human Services" and "The Manufacturer Identified in Section XI of this Agreement." However, Section XI does not identify King, or any particular manufacturer, as a party to the agreement. Because there is no evidence that the Sample Agreement represents a binding contract, the administrative remedy provision contained therein cannot be enforced against the parties. In the current posture of the record, the Court could just ignore the Sample Agreement.

Conclusion

In conclusion, if the Sample Agreement is binding on King, the dispute resolution section regarding Medicaid Utilization Information has no applicability to King's Counterclaim of a liquidated overpayment of monies when King has not disputed Medicaid Utilization Information. Affirmatively, King does not challenge, dispute or allege any discrepancy in the Medicaid

Utilization Information provided by the State of Alabama. Furthermore, the Sample Agreement was not provided to King in a timely manner, was not entered into the record properly, is not executed and, in fact, does not have the word King in the document. Consequently, the State of Alabama's Motion to Dismiss King's Counterclaim should be denied.

LISA W. BORDEN (WRI-027)
SAM BERRY BLAIR (pro hac vice)

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Certificate of Service

I hereby certify that the foregoing Opposition of Defendants King Pharmaceuticals, Inc. and Monarch Pharmaceuticals, Inc. to State's Motion to Dismiss Counterclaim has been served upon all counsel of record via electronic transmission to LNFS, pursuant to the Court's Case Management Order No. 2, this 26th day of May, 2006.

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TELECOPY TRANSMITTAL REPORT

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TO: Mr. Sam B. Blair, Jr.

TELECOPIER NUMBER: 1-901-577-2303

FROM: Clinton C. Carter

NO. PAGES: 2

RE: Alabama v. Abbott

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Re: ***State of Alabama v. Abbott Laboratories, Inc., et al.***
In the Circuit Court of Montgomery County, Alabama
Civil Action No. Cv-2005-219-PR

Dear Sam:

I am in receipt of your correspondence of April 25, 2006. This will confirm that we do not plan to submit any further briefs or cases to the Court regarding the hearing set for May 19, 2006. Please confirm that you also will not file any additional briefs or cases before the hearing.

Thank you for your time and cooperation. I look forward to hearing from you.

With kindest regards,

BEASLEY, ALLEN, CROW,
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CLINTON C. CARTER

CCC/mml